IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

THURSDAY, THE 7TH DECEMBER 2006 / 16TH AGRAHAYANA 1928

CRL.A.No. 1456 of 2006(B)

SC.230/2005 of ADDL.SESSIONS COURT (ADHOC)III, MANJERI
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APPELLANT: ACCUSED

NARAYANAN, S/O. KUMARAN,
C.NO.3330, CENTRAL PRISON, KANNUR.

BY ADV. SRI.GEORGE SEBASTIAN(STATE BRIEF)

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY
EXCISE INSPECTOR, EXCISE RANGE,
MANJERI.

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 7-12-2006 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. Appeal No. 1456 of 2006

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Dated, this the 7th day of December 2006

JUDGMENT

In this appeal preferred from the Central Prison, Kannur, the appellant (Narayanan) who was the sole accused in S.C. 230/05 on the file of the Addl. Sessions Judge, Fast Track Court No. III (Adhoc), Manjeri for an offence punishable under Sec. 55 (g) of the Abkari Act challenges the conviction entered and the sentence passed against him by the said court.

2. The case of the prosecution is that on 24-9-2004 at about 11.30 a.m. in House No. III/220 of Thiruvali Grama Panchayath at a place called Thayankode in Thiruvali Village of Nilambur Taluk. the accused was found in possession of 32 liters of "wash" for the purpose of manufacturing arrack in contravention of the provisions of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for the aforementioned offences, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 7 witnesses as P.W.s 1 to 7 and got marked 12 documents as Exts. P1 to P12 and 6 material objects as Mos 1 to 6.

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. The learned Addl. Sessions Judge, did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C. The accused was,

therefore, called upon to enter on his defence. He did not adduce any defence evidence. The case was thereafter heard and disposed of. As per judgment dated 27-03-2006, the learned Addl. Sessions Judge found the appellant guilty of the offence charged against him and sentenced him to undergo rigorous imprisonment for a term of four years and to pay a fine of Rs. 1,00,000/- and on default to pay the fine to suffer simple imprisonment for another six months under Sec. 55(g) of the Abkari Act. It is the said judgment which is assailed in this appeal.

6. I heard Advocate Sri. George Sebastian, the learned counsel who defended the appellant on State Brief and Advocate Sri. Sivakumar, the learned Public Prosecutor who defended the State.

7. The only point which arises for consideration is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:-

8. P.W.1 is the Excise Inspector, Malappuram,. He was in the Excise Special Squad, Malappuram. He is the detecting officer. P.W.2 was the Excise Preventive Officer who accompanied P.W.1. P.Ws. 3 and 6 are the independent witnesses to the search and seizure and signatories to Exts.P2 arrest memo, P3 search list and P5 scene mahazar. Both of them turned hostile to the prosecution. P.W.4 was the Excise Inspector (Manjeri) who registered the case as Crime No. 24/04 of Manjeri Excise Range. Ext.P6 is the crime and occurrence report. During the course of investigation, he produced the material objects before court as per Ext.P7 property list. P.W.5 was the

Secretary of Thiruvali Grama Panchayath who proved Ext.P9 ownership certificate to show that the accused was the owner of house No. VIII/255 of Thiruvali Panchayath. P.W.7 was the Excise Inspector who after the conclusion of investigation laid the charge before court.

9. After an anxious re-appraisal of the oral and documentary evidence in the case, I am not satisfied that the prosecution has brought home to the guilt of the accused beyond reasonable doubt.

10. What is unravelled by the prosecution evidence is the following:-

P.W.1 who was the Excise Inspector, Malappuram detected the offence. He was proceeding on patrol duty along with P.W.2, Excise Preventive Officer and Excise guards. He claims to have reached the house in question at about 11.30 a.m. on 24-9-2004 after getting credible information to the effect that the accused was keeping in his house "wash" for distilling arrack and was also having distilling apparatus. He prepared Ext.P1 search memo and sent the same to the court and then proceeded to the house of the accused. The accused was found in the veranda of the said house. The excise party entered the house and found 32 liters of "wash" kept in three pots, a big vessel and one jerry can. The house he searched was bearing No. III/220 of Thiruvali Panchayath. He confirmed the contents of the vessels through smell and taste. Thereafter, he drew 500 ml. of "wash" by way of sample in a bottle having 750 ml. capacity. He prepared Ext.P3 search list to evidence the search of the house and Ext.P5 seizure mahazar. He arrested the accused and prepared Ext.P2 arrest memo and gave notice of the arrest to his near relatives as per Ext.P4 arrest notice. He also seized the vessels containing the

contraband liquor. He then proceeded to Manjeri Excise Office together with the accused, the contraband liquor, sample bottle and the seizure documents which were entrusted to P.W.4 the Excise Inspector who on the basis of Exts.P3 and P5 prepared Ext.P6 crime and occurrence report and registered the case as 24/2004 of Manjeri Excise Range. On 25-9-2004 P.W.4 produced before the Magistrate the material objects and the sample as evidence by Ext.P7 property list. The sample bottle was forwarded to the chemical examiner who as per Ext.P12 chemical report dated 17-11-2005 found that the sample contained 14.14 percent by volume of Ethyl Alcohol. This in short is the case of the prosecution.

11. The specific case of P.W.1 as is discernible from Ext.P1 search memo, Ext.P3 search list, Ext.P5 seizure mahazar is that the house which he searched and from which the contraband liquor was seized was bearing No. III/220 of Thiruvali Panchayath. P.W.1 claims to have confirmed the ownership of the house by checking the rational card of the accused. This is how, the prosecution attempts to prove that the contraband liquor was seized from the house of the accused. But P.W.5 the Secretary of Thiruvali Grama Panchayath would depose that as evidenced by Ext.P9 ownership certificate dated 12-07-2005 the accused was the owner of the house hearing VIII/225 of the said Panchayath for the period from 1996-97 to 2005-2006. P.W.5 or the prosecution has no case that the accused was the owner of two houses in that Panchayath. There is also no evidence to show that the accused was the owner of house No. III/220. No proof was also forthcoming to show that building No. III/220 was the earlier number of the house made mention of in Ext.P9

ownership certificate. So, the prosecution has not proved beyond doubt that house No. III/220 of Thiruvali Panchayath from which the contraband liquor seized belongs to the accused.

12. Even assuming that it could reasonably be presumed that the accused was the owner of the said house but going by the testimony of P.W.1 the accused was seen only in the veranda of the said house, the contraband liquor was seized from the kitchen of the said house. P.W.1 has mentioned about the presence of a lady in that house. He confessed that that lady was not questioned by him. Likewise, the presence of the father of the accused is also admitted by P.W.1. When besides the accused there were two other persons found in the house, it cannot conclusively be that the accused was in exclusive possession of the house or at any rate, in exclusive possession of the contraband liquor found in the kitchen of the house. In other words, access to the kitchen by other members of the house could not also be ruled out. Under these circumstances, it cannot be conclusively held that the accused was in exclusive possession of the kitchen from where the contraband liquor was seized.

12. Even if it were to be assumed that the contraband liquor was seized from the house in the veranda of which the accused was found and the accused was in possession of the said contraband liquor, the prosecution relies on the report of the Chemical examiner to confirm that the contents of the vessels found in the kitchen of the said house was contraband liquor. In fact, it has been judicially settled also that it will be unsafe to rely on smell and taste of the Abkari Officers to confirm the identity of liquor in cases under the

Abkari Act. ***(Muthan Ankamuthu v. State of Kerala - See 1970 KLT 427)*** Ext.P12 is the chemical analysis report relied on to contend that the sample taken from the contraband liquor seized from the house of the accused was containing 14.14 percent by volume of Ethyl Alcohol. But in order to rely on Ext.P12 report it must conclusively be proved that the sample which ultimately reached the hands of the chemical examiner was taken from the very same contraband liquor which was allegedly drawn by P.W.1 from the house in question . Going by the testimony of P.W.1 and the recitals in Ext.P5 seizure mahazar the sample which P.W.1 had drawn was 500 ml. But what Ext.P2 chemical report states is that the sample which was received for analysis was containing 750 ml. Even Ext.P8 forwarding note dated 24-9-2004 unambiguously states that the sample which was being dispatched is 500 ml. As mentioned earlier, material objects including the sample bottle were produced before court only on 25-9-2004 and were received as item 227/04. There is no evidence as to who dispatched the sample to the chemical examiner's laboratory and on which date. The thondi section clerk who is ordinarily the custodian of the thondi articles was neither cited nor examined. If we go by Ext.P12 report of chemical analysis it refers a letter dated 4-9-2004 from the committal court. It is pertinent to note that the detection in this case was on 24--9-2004. If so, the Magistrate could not have addressed the chemical examiner on 4-9-2004 with regard to the dispatch of sample in this case. Even if it were to be assumed that the date shown as 4-9-2004 in the letter allegedly received by the chemical examiner from the Magistrate was a mistake, the sample drawn by P.W1 had reached the court only on 25-9-2004.

Hence the Magistrate could have addressed the chemical examiner only on 25-9-2004 or subsequent dates and he could not have addressed the chemical examiner on 24-9-2004. Unless the prosecution establishes that the sample which had changed several hands and which ultimately reached the hands of the chemical examiner was the very same sample which was drawn from the contraband liquor allegedly seized from the house of the accused, it is not possible to connect the accused with the alleged crime. ***(State of Rajasthan v. Daulat Ram - See AIR 1980 SC 1340) .*** The conviction entered and the sentence passed by the court below after looking these vital aspects cannot, therefore, be sustained and are accordingly dislodged. The appellant is found not guilty of the offence punishable under Sec. 55(g) of the Abkari Act. He is set at liberty. He shall be released from prison forthwith unless his continued detention is needed for any other case.

In the result, this Crl. Appeal is allowed as above.

V. RAMKUMAR,
(JUDGE)

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V. RAMKUMAR, J.

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Crl. Appeal No. 1456 of 2006

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Dated, this the 7th day of December 2006